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 9 SHERIFF LAURIE SMITH and  
 10 COUNTY OF SANTA CLARA

11 UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 13 (San Jose)

14 TOM SCOCCA, MADISON SOCIETY, INC.,  
 15 and THE CALGUNS FOUNDATION, INC.,

16 Plaintiffs,

17 v.

18 SHERIFF LAURIE SMITH (In her individual  
 19 and official capacity.), COUNTY OF SANTA  
 20 CLARA, and DOES 1 to 20,

21 Defendants.

No. CV11-01318 EMC

**DEFENDANTS' RESPONSE TO ORDER  
 TO SHOW CAUSE**

**I.**

**INTRODUCTION**

22 On January 6, 2012, the Court heard oral argument on a motion to dismiss filed by  
 23 Defendants County of Santa Clara and Sheriff Laurie Smith. During the hearing, Plaintiffs Tom  
 24 Scocca, Madison Society, Inc., and Calguns Foundation, Inc. alleged that strict or intermediate  
 25 scrutiny applied to the Sheriff's exercise of her discretion in granting or denying permits to carry  
 26 concealed weapons. Plaintiffs alleged that a fundamental right was at issue and disavowed any  
 27 argument of rational review of their equal-protection claim (i.e., that even if no fundamental right  
 28 was involved, the Sheriff's denial of Scocca's application for a permit to carry a concealed weapon  
 was without rational basis).

On January 23, 2012, the Court ordered Plaintiffs to show cause why proceedings in this case

1 should not be stayed pending the Ninth Circuit's *en banc* hearing and decision in *Nordyke v. King*,  
2 644 F.3d 776 (9<sup>th</sup> Cir. 2011, *rehearing en ban granted*, No. 07-15763, November 28, 2011). The  
3 Court directed Plaintiffs to "focus particularly on the possible harm, if any, to Mr. Scocca which  
4 may result from the granting of a stay" because "the Court has, at this juncture, serious concerns  
5 over whether Madison Society, Inc. and Calguns Foundation, Inc. have standing."

6 In Plaintiffs' response to the Order to Show Cause the only possible harm to Scocca  
7 mentioned is that he will have to conduct "time-consuming discovery" after disposition of *Nordyke*.  
8 Plaintiffs' Response to OSC at 5:5-17. But the timing of discovery in this case is secondary to the  
9 appropriate level of scrutiny to apply to the Sheriff's exercise of discretion in granting or denying  
10 applications for permits to carry concealed weapons. *Nordyke* will likely provide guidance on the  
11 appropriate level of scrutiny to apply in this case. The three-judge panel analyzed the standard of  
12 scrutiny of an ordinance that banned possession of firearms on county property and concluded that  
13 only regulations that substantially burden the right to keep and bear arms trigger heightened scrutiny  
14 under the Second Amendment.

15 The level of scrutiny may prove dispositive to the pending motion to dismiss and may  
16 determine whether this case ever proceeds to the discovery phase. Thus, before the parties undertake  
17 costly and time-consuming discovery they should await guidance from the Ninth Circuit in *Nordyke*,  
18 which will likely define the standard of scrutiny applicable to the Sheriff's exercise of discretion in  
19 granting or denying applications for permits to carry concealed weapons. Even if this case were to  
20 proceed to the discovery phase, knowing the appropriate level of scrutiny will assist the parties  
21 during discovery, the summary judgment stage, and trial.

22 Scocca has a permit to openly carry a firearm in the course and scope of his employment and  
23 may use a firearm for self-defense in his home. Plaintiffs failed to show that he will suffer harm if  
24 this case is stayed. Accordingly, the Court should stay this case until final disposition of *Nordyke*.

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1 II.

2 ANALYSIS

3 A. **THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE NINTH CIRCUIT IN**  
 4 ***NORDYKE* WILL PROVIDE GUIDANCE AS TO THE APPROPRIATE LEVEL OF**  
**5 SCRUTINY TO APPLY IN THIS CASE**

6 If the Ninth Circuit ultimately agrees with the three-judge panel that an  
 7 equal protection claim based on the fundamental right to bear arms for  
 8 self-defense is more appropriately analyzed under the Second  
 9 Amendment, which provides an explicit textual source of  
 10 constitutional protection (644 F.3d at 794), then Plaintiffs would have  
 11 no claim, having disavowed any argument under rational basis review.

12 Order to Show Cause at 1:25-2:1.

13 There is a substantial likelihood that the Ninth Circuit will provide guidance in *Nordyke* as to  
 14 the appropriate level of scrutiny to limitations on carrying firearms in public. In *Nordyke*, the three-  
 15 judge panel noted that the United States Supreme Court has yet to articulate a standard of review in  
 16 Second Amendment cases. *Nordyke*, 644 F.3d at p. 782. The court noted that the Supreme Court's  
 17 reasoning in two recent Second Amendment cases, *District of Columbia v. Heller*, 554 U.S. 570  
 18 (2008) and *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), "suggests that heightened scrutiny does  
 19 not apply unless a regulation substantially burdens the right to keep and bear arms for self-defense."  
 20 *Id.* at 783.

21 The *Nordyke* court explained that *Heller* distinguished the blanket ban on handguns in the  
 22 District of Columbia from permissible gun-control regulations such as eighteenth-century  
 23 gunpowder storage laws by examining the extent to which each law burdened the core right to armed  
 24 self-defense. *Nordyke*, 644 F.3d at 783. The court concluded that applying strict scrutiny to every  
 25 gun-control regulation would be inconsistent with *Heller*'s reasoning because courts would have to  
 26 determine whether challenged gun-control regulations are narrowly tailored to a compelling  
 27 governmental interest (i.e., reducing gun crime). *Id.* at 784. Such an approach was renounced in  
 28 *Heller* because it would base the constitutionality of gun-control regulations on "judicial  
 estimations" of the extent to which each regulation is likely to meet the compelling governmental  
 interest in reducing crime. *Id.* The *Nordyke* court accordingly held that "a substantial burden  
 framework will prove to be far more judicially manageable than an approach that would reflexively

1 apply strict scrutiny to all gun-control laws.” *Id.*

2 The *Nordyke* court held that where a law does not purposefully operate to the detriment of a  
3 suspect class, the only requirement of equal protection is that the law be rationally related to a  
4 legitimate governmental interest. *Nordyke*, 644 F.3d at 794. The court further concluded that the  
5 right at issue – the right to keep and bear arms for self-defense – is more appropriately analyzed  
6 under the Second Amendment, which provides an explicit textual source of constitutional protection.  
7 *Id.* Thus, there is a substantial likelihood that the Ninth Circuit will address whether constitutional  
8 claims that challenge gun-related regulations should be analyzed under the Equal Protection Clause  
9 of the Fourteenth Amendment or the Second Amendment.

10 Plaintiffs assume that either intermediate scrutiny or strict scrutiny will apply in this case.  
11 Plaintiffs’ Response to OSC at 3:10. But the *Nordyke* court, in rejecting strict scrutiny, noted that  
12 the United States Supreme Court does not apply strict scrutiny to every law that regulates the  
13 exercise of a fundamental right. *Id.* at 785 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S.  
14 833, 873 (1992) [rational basis scrutiny to laws that regulate, but do not significantly burden,  
15 fundamental rights]; *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) [rational basis review of  
16 abortion regulations so long as they do not pose an “undue burden” on the right to abort a non-viable  
17 fetus]; and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) [the government may impose  
18 reasonable restrictions on the time, place, or manner of protected speech provided that the  
19 restrictions are not too cumbersome]). Thus, Plaintiffs’ assumption that either intermediate or strict  
20 scrutiny will apply in this case is unfounded.

21 Moreover, Plaintiffs’ contention that this action should not be stayed because other cases that  
22 have been stayed pending *Nordyke* are in a different procedural phase is unpersuasive. Plaintiffs  
23 cited four cases that they contend “are either already in the Court of Appeals on undisputed facts or  
24 they have motions for summary judgment pending.” Plaintiffs’ Response to OSC at 4:9-5:3.<sup>1</sup> But  
25 there are additional cases involving challenges to denials of applications for permits to carry  
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28 <sup>1</sup> Here, Defendants have a dispositive motion pending, which actually makes this case more akin to cases  
stayed with summary judgment motions pending, and further supports staying this case.

1 concealed weapons that are in a similar procedural phase as this action (i.e., have not entered the  
2 discovery phase) that are currently stayed pending *Nordyke*. See, e.g., *Rothery v. Blanas*, 9<sup>th</sup> Cir.  
3 No. 09-16852 (stayed pending *Mehl v. County of Sacramento*, No. 08-15773, which was withdrawn  
4 from submission pending decision in *Nordyke*); *Jacobs v. Reed, et al.*, E.D. Cal. Case No. 10-CV-  
5 00913.

6 Thus, *Nordyke* will likely provide guidance on the appropriate level of scrutiny to apply to  
7 the Sheriff's exercise of discretion in granting or denying applications for permits to carry concealed  
8 weapons. Accordingly, the Court should not rule on Defendants' motion to dismiss while the Ninth  
9 Circuit is reviewing *Nordyke en banc* and should stay this case pending final disposition of *Nordyke*.

10 **B. PLAINTIFFS FAILED TO SHOW THAT SCOCCA WOULD BE HARMED BY A**  
11 **STAY**

12 In Plaintiffs' response to the Order to Show Cause the only possible harm to Scocca  
13 mentioned is that he will have to conduct allegedly "time-consuming discovery" after disposition of  
14 *Nordyke*. Plaintiffs' Response to OSC at 5:5-17. But Plaintiffs failed to state what discovery they  
15 believed was necessary, particularly in light of their prior representation that they have already  
16 obtained records for over 70 holders of concealed weapons permits through requests pursuant to the  
17 California Public Records Act. Thus, Plaintiffs have the information they need to evaluate whether  
18 Scocca was in fact similarly situated to individuals who have been granted permits to carry  
19 concealed weapons.

20 Scocca's contention that discovery will be time consuming supports staying this case pending  
21 disposition of *Nordyke*. As discussed above, depending on the level scrutiny the Ninth Circuit holds  
22 is applicable to challenges to gun regulations, the pending motion to dismiss may be granted without  
23 the need for time-consuming discovery. Staying the case would save limited resources litigating  
24 constitutional claims that may not be cognizable.

25 Further, Plaintiffs failed to explain how Scocca would be harmed by waiting until after the  
26 Ninth Circuit provides guidance on the level of scrutiny to apply to challenges to gun regulations.  
27 Plaintiffs' citation to a recent change in California law that bans openly carrying unloaded handguns  
28 in public is unavailing because there is no right to carry an open or concealed firearm in public.

1 The United States Supreme Court held in *Heller* that the Second Amendment does not  
 2 protect the right of citizens to carry arms for any sort of confrontation just as the First Amendment  
 3 does not protect the right of citizens to speak for any purpose. *Heller*, 554 U.S. at 596. Thus, there  
 4 is no right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever  
 5 purpose.” *Id.* at 626. Further, the Court noted that “the majority of the 19<sup>th</sup>-century courts to  
 6 consider the question held that prohibitions on carrying concealed weapons were lawful under the  
 7 Second Amendment or state analogues.” *Id.*

8 Scocca admitted in the complaint that he has a permit to openly carry a loaded firearm during  
 9 the course and scope of his employment as a private investigator. Complaint ¶ 31. Moreover, he is  
 10 able to use a firearm in his home for self-defense. Cal. Gov. Code § 26055 (possession of loaded  
 11 weapon at place of residence exempt from prohibition on carrying loaded firearm in public). Thus, a  
 12 stay of this case would not impose a substantial or undue burden on Scocca’s right to keep and bear  
 13 arms.

14 **C. PLAINTIFFS HAVE CONCEDED THAT THE ORGANIZATIONS DO NOT HAVE**  
 15 **STANDING AND THEREFORE WOULD NOT BE HARMED BY A STAY**

16 Madison Society, Inc. and Calguns Foundation, Inc. have conceded in their response to the  
 17 order to show cause that they do not have standing. These organizations indicated that they are  
 18 prepared to have some of their individual members apply for applications to carry concealed  
 19 weapons. Plaintiffs’ Response to OSC at 6:23-25. Thus, it is undisputed that at this time neither  
 20 organization can meet the first element of *Hunt v. Washington State Apple Advertising Commission*,  
 21 432 U.S. 333, 343 (1977), which requires at least one organization member to have standing to sue  
 22 in his or her own right. A stay of this case would therefore not cause any harm to either Madison  
 23 Society, Inc. or Calguns Foundation, Inc.

24 **III.**

25 **CONCLUSION**

26 The Ninth Circuit’s *en banc* decision in *Nordyke* will likely provide guidance on the  
 27 appropriate level of scrutiny to apply to Plaintiffs’ constitutional claims in this case. Several  
 28 appellate and district court cases where gun-control regulations are at issue have been stayed

1 pending the *Nordyke* decision, including cases like the present action that involve challenges to  
2 denials of applications for permits to carry concealed weapons. Given the lack of showing of harm  
3 to Plaintiffs if this case were stayed, and the substantial likelihood that *Nordyke* will provide  
4 guidance as to the appropriate level of scrutiny to apply to the constitutional claims in this case,  
5 Defendants respectfully request that the Court stay this case pending final disposition in *Nordyke*.

6 Dated: February 3, 2012

Respectfully submitted,

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